85-844

No. 85-

Supreme Court, U.S.
FILED
NOV 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CLYDE L. DAVIS, JR.

Petitioner,

v.

UNITED AUTOMOBILE WORKERS,
UNITED AUTOMOBILE WORKERS LOCAL 970,
and CLAUDE PEREIRA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison
Arthur L. Fox II

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

Jere D. McWinn
P.O. Box 985
Eagle, Idaho 83616

Of Counsel

November 1985

CASILLAS PRESS INC - 1717 K STREET NW, WASHINGTON DC - 223-1220

App

QUESTIONS PRESENTED*

1. In a suit by a union member against his union to enforce the Landrum-Griffin Act, did the court of appeals err by deviating from the normal federal rule, which requires it to borrow the most analogous state statute of limitations, and instead relying on the six-month period for filing charges under the National Labor Relations Act, which is used for "hybrid" duty of fair representation actions against an employer and a union?

2. If the six-month period is proper in this case, did the court of appeals err in applying it retroactively to a complaint filed six years before the six-month period was first announced, where the clear precedent in the circuit in which the case was filed was that the action was timely?

---

*All parties to the proceeding in the court below are listed in the caption.

TABLE OF AUTHORITIES

Cases:	Page
Adkins v. International Union of Electrical Workers, 769 F.2d 330 (6th Cir. 1985)	9
Berard v. General Motors Corp., 493 F. Supp. 1035 (D. Mass. 1980), *aff'd,* 657 F.2d 261 (1st Cir. 1980)	7
Bernard v. Teamsters Local 435, 587 F. Supp. 524 (D. Colo. 1984)	10
Boilermakers v. Hardeman, 401 U.S. 233 (1971)	11
Bowen v. Postal Service, 459 U.S. 212 (1983)	11
Carpenter v. West Virginia Flat Glass, 763 F.2d 622 (4th Cir. 1985)	16
Chevron Oil Co. v. Huson, 404 U.S. 97 (1971)	*passim*
Copitas v. Retail Clerks, 618 F.2d 1370 (9th Cir. 1980)	7, 14
Dantagnan v. Longshoremen Local 1418, 496 F.2d 400 (5th Cir. 1974)	14
DelCostello v. Teamsters, 462 U.S. 151 (1983)	*passim*
Duncan v. Peninsula Shipbuilders Ass'n, 394 F.2d 237 (4th Cir. 1968)	12
Edwards v. Sea-Land Svce., 720 F.2d 857 (5th Cir. 1983)	17
Edwards v. Teamsters Local 36, 719 F.2d 1036 (9th Cir. 1983)	16

	Page
Gordon v. Winpisinger, 581 F. Supp. 234 (E.D.N.Y. 1984)	11
Johnson v. Railway Express Agency, 421 U.S. 454 (1975)	10
Lincoln v. Machinists District 9, 723 F.2d 627 (8th Cir. 1983)	16, 17
Linder v. Berge, 739 F.2d 686 (1st Cir. 1984)	9
Mitchell v. IBEW Local 46, 100 LRRM 2935 (W.D. Wash. 1979)	15
Monarch Long Beach Corp. v. Teamsters Local 812, 762 F.2d 228 (2d Cir. 1985)	9, 10
NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967)	11
Perez v. Dana Corp., 718 F.2d 581 (3rd Cir. 1983)	16
Sewell v. Machinists, 445 F.2d 545 (5th Cir. 1971)	7, 14
Simpson v. Director, Office of Workers Comp. Programs, 681 F.2d 81 (1st Cir. 1982)	17
Singer v. Flying Tiger Line, 652 F.2d 1349 (9th Cir. 1981)	17
Smith v. General Motors Corp., 747 F.2d 372 (6th Cir. 1984)	17
Steelworkers Local 1397 v. Steelworkers, 748 F.2d 180 (3d Cir. 1984)	9, 10, 16
UPS v. Mitchell, 451 U.S. 56 (1981)	7

Page

Vaca v. Sipes,
386 U.S. 171 (1967) 11

Valencia v. Anderson Bros. Ford,
617 F.2d 1278 (7th Cir. 1980),
rev'd on other grounds, 452 U.S. 205 (1981) 17

Vallone v. Teamsters Local 705,
755 F.2d 520 (7th Cir. 1984) 9

Wilson v. Garcia,
105 S. Ct. 1938 (1985) 8

Woods v. IBEW Local 613,
404 F. Supp. 110 (N.D. Ga. 1975) 14

Zemonick v. Consolidation Coal Co.,
762 F.2d 381 (4th Cir. 1985) 17

Statutes and Rules:

Labor-Management Relations Act,
29 U.S.C. §§ 151 *et seq.* 4, 10

§ 301, 29 U.S.C. § 185 4
§ 303, 29 U.S.C. § 187 10

Labor-Management Reporting and Disclosure Act of 1959,
29 U.S.C. §§ 401 *et seq.* *passim*

§ 101(a)(2), 29 U.S.C. § 411(a)(2) 12
§ 101(a)(3), 29 U.S.C. § 411(a)(3) 12
§ 101(a)(4), 29 U.S.C. § 411(a)(4) 4
§ 101(a)(5), 29 U.S.C. § 411(a)(5) 12
§ 201(c), 29 U.S.C. § 431(c) 12
§ 501, 29 U.S.C. § 501 12

National Labor Relations Act,
29 U.S.C. §§ 151 *et seq.* *passim*

§ 8(b)(4), 29 U.S.C. § 158(b)(4) 10
§ 10(b), 29 U.S.C. § 160(b) *passim*

Page

42 U.S.C. § 1981 12

Other Authorities:

Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied,"* 61 N. Car. L. Rev. 745 (1983) 16
McAdams, *Power and Politics in Labor Legislation* (1964) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-

CLYDE L. DAVIS, JR.

Petitioner,

v.

UNITED AUTOMOBILE WORKERS,
UNITED AUTOMOBILE WORKERS LOCAL 970,
and CLAUDE PEREIRA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Clyde L. Davis petitions the Court to issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The decision of the district court is not reported, and is set forth at pages 13a to 19a of the appendix to this petition (hereafter "App."). The court of appeals' opinion is reported at 765 F.2d 1510 and is reprinted at App. 1a to 12a.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eleventh Circuit were issued on July 22, 1985. On September 30, 1985, Justice Powell signed an order extending the time for filing a petition for the writ of certiorari to November 15, 1985. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOKED BELOW

Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), provides in relevant part:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, . . . Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . .

STATEMENT

Petitioner Clyde L. Davis was a member and, at various times, an officer of respondent Local 970 of the United Automobile Workers, which is a small local union consisting of approximately 75 members in Jacksonville, Florida. Petitioner had serious differences with the local's president, but then assumed inactive membership status for about two years while he served as a foreman for Ford Motor Company, for which Local 970's members worked. After he left his foreman's position and returned to the bargaining unit in February, 1976, charges were filed

against him with the Local in March, 1976. The charges alleged that he had made various statements, some of which are disputed and some not, and had "belittled this Local," made accusations against officers in an "attempt to create dissension" and threatened and intimidated others. The statements, which formed the basis of his discipline, are set forth in an appendix to the decision of the court of appeals and appear *infra* at App. 10a-12a.

After a local union trial in April, 1976, which petitioner declined to attend because he said he feared that there would be a physical confrontation, he was expelled from membership by a decision of the Local 970 Executive Board issued on September 14, 1976. In October or November, 1976, Davis asked the local president for a copy of the UAW Constitution so that he could determine how to appeal his discipline, but was told that there were only enough constitutions for members and so he couldn't have one. In February, 1977, he wrote a letter to a representative of respondent United Auto Workers explaining the problem and asking for redress for unjust treatment.

Having received no response, petitioner filed suit in a Florida state court against the UAW, Local 970, and respondent Claude Pereira, a UAW official whom Davis considered to have encouraged his expulsion, on June 16, 1977 (nine months after he was expelled). His complaint alleged a conspiracy to remove him from the union for improper reasons (*i.e.*, his opposition to the union's leadership), intentional infliction of emotional injury, and removal from the union without due process. In July, 1977, respondents removed the action to the United States District Court for the Middle District of Florida, on the ground that the claim stated in Davis' complaint arose under the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. §§ 401 *et seq.*, but the

case was remanded to state court in February, 1978. In May, 1978 (one year and eight months after his expulsion), petitioner filed a second complaint against the two union entities in federal court alleging that he had been expelled "contrary to federal law and [union] rules," and in August, 1978, the first action was removed to federal court where it remained.

Six years later the district court granted summary judgment for respondents on the ground that Davis had failed to exhaust his remedies before filing suit, invoking the proviso of section 101(a)(4) of the LMRDA, 29 U.S.C. § 411(a)(4), which gives the courts discretion to stay their hands if suit is filed before exhausting internal union remedies. App. 13a-19a. Davis appealed, arguing that several of the exceptions to the discretionary exhaustion requirement applied to his case.

Several months after oral argument, however, the court asked the parties to submit supplemental briefs addressing the question of whether the case was controlled by *DelCostello v. Teamsters,* 462 U.S. 151 (1983). In *DelCostello,* this Court had created an exception to the normal federal rule under which the most analogous state statute of limitations is borrowed where Congress has not specifically provided a federal period. The Court there held that the statute of limitations for "hybrid actions" under the duty of fair representation ("DFR") and under section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185, to enforce a collective bargaining agreement, was to be borrowed from the six-month period allowed by section 10(b) of the National Labor Relations Act ("NLRA") for filing unfair labor practice charges with the National Labor Relations Board.

In response, respondents – which had made this argu-

ment to the district court, but had not pursued it on appeal – accepted the court's suggestion, while Davis argued both that the limitations period should be borrowed from state law and that, if section 10(b) were applied, it should not be applied retroactively. Davis observed that several different state statutes of limitations might be applicable – tort (four years), malpractice (two years), contract (five years) or statutory actions (four years) – but that the facts of his case did not require a specific choice, inasmuch as each of these periods was longer than the time between his expulsion and even the second of his two actions (one year and eight months).

The court of appeals affirmed the grant of summary judgment on statute of limitations grounds. It recognized that there were important distinctions between hybrid actions, such as *DelCostello,* to enforce the DFR and the collective bargaining agreement, and this suit brought to redress union violations of the free speech rights guaranteed by the LMRDA. App. 7a-8a. The court specifically noted that actions such as this are brought only against the union and not against the employer, and so would not implicate the same interest in stable labor-management relationships as would a suit which challenged a settlement of a dispute under a collective bargaining agreement. App. 8a. Moreover, it concluded that a union member's right of free speech, which is expressly protected by Congress in the LMRDA, deserved greater protection against extinction by a short statute of limitations than the DFR, which had been merely implied from the NLRA, the very statute to which section 10(b) applies. *Id.*

Nevertheless, the court concluded that it was "constrained by the analysis employed in *DelCostello* to apply the same limitations period to the present lawsuit," *id.*, because this Court had based its decision largely on the danger that

uncertainty about grievance settlements might threaten labor peace: "we believe we are bound to find a similar connection between labor peace and an action based on a union's alleged mistreatment of its members by the denial of statutorily protected rights." App. 8a-9a. Without explaining how uncertainty over the restoration of petitioner's union membership or the payment of damages by his union for violating his rights might pose a similar threat to "labor peace," the court held that the six-month limitations period applied to this action.

The court also held that the decision must be applied retroactively. It recognized that "[t]he present case appears closely analogous to the situation in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971)," where this Court declined to apply a decision adopting a one-year limitations period to an action begun in the reasonable belief that a longer statute applied. App. 10a n. 14. Nevertheless, the panel again concluded that it was "bound" by a decision of another panel of the same court that *DelCostello* should be applied retroactively to hybrid DFR/contract actions which were pending when *DelCostello* was decided. *Id.*

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER LOWER COURTS AND THREATENS THE ENFORCEMENT OF THE BILL OF RIGHTS PROTECTED BY THE LMRDA.

History

With some exceptions, federal statutes do not contain their own statutes of limitations; rather, they must be borrowed from other sources. This Court has repeatedly declared that, as a general rule, courts should apply the most

closely analogous state statute of limitations. *Wilson v. Garcia,* 105 S. Ct. 1938 (1985). As a result, until very recently every court which had considered the statute of limitations question for LMRDA actions had chosen among various state statutes, such as actions arising under statute, *Copitas v. Retail Clerks,* 618 F.2d 1370 (9th Cir. 1980), injury to personal rights, *Sewell v. Machinists,* 445 F.2d 545, 548-550 (5th Cir. 1971), and tort. *Berard v. General Motors Corp.,* 493 F. Supp. 1035, 1043 (D. Mass.), *aff'd,* 657 F.2d 261 (1st Cir. 1980). Until *DelCostello,* no court of which petitioner is aware had applied any federal statute to an LMRDA action.

There is a narrow exception to the general rule, however, for cases in which the analogous state statutes would frustrate the implementation of national policies, of which the "hybrid" DFR action against a union and an employer is one example. The first time that the issue of the proper limitation period for DFR actions reached this Court was in *UPS v. Mitchell,* 451 U.S. 56 (1981). In *Mitchell,* the narrow question on which certiorari had been granted was which state statute was the most analogous for suits against employers alone, and the Court decided that the proper statute was that for a suit to vacate an arbitration award. It reasoned that this was analogous to a DFR suit against an employer, and that the time permitted for the other most analogous alternative — an action on a contract — allowed too long a period in which the propriety of the disposition of a grievance was in question, and would frustrate federal policy favoring prompt resolution of labor-management disputes.

Two years later, in *DelCostello,* the question presented was whether to apply a federal limitations period instead of any of the state alternatives in "hybrid" suits against

both employer and union. The Court reiterated its concern that several state limitations periods available for borrowing were so lengthy that employer-union compromises about the administration of a contract could remain in limbo for years, thus endangering stability in labor relations and, in the long run, labor peace. 462 U.S. at 168-169. The other most analogous statutes, however, those applied to actions to vacate arbitration awards, were so short – generally three months – that they did not give enough time for aggrieved employees to initiate suit. *Id.* at 167-168. Moreover, the Court recognized, if the most analogous state statute were applied to the employer (*i.e.*, actions to vacate an arbitration) and to the union (*i.e.*, tort, malpractice, or rights created by statute), the result would be the application of different limitations periods to two parts of the same lawsuit, which would clearly have been undesirable. *Id.* at 169 n.19.

Still, the Court said, "these objections to the resort to state law might have to be tolerated if state law were the only source reasonably available for borrowing, as it often is." *Id.* at 169. However, it found that section 10(b) of the NLRA was more appropriate than any of the state analogies, both because it had been designed by Congress to accommodate a "very similar balance of interests," *i.e.*, employee rights versus the stability of private adjustment of labor disputes, and because the DFR was itself a cause of action implied from the NLRA. *Id.* at 169-171.

The Court was careful to add the admonition that the lower courts should not too readily decline to adopt state limitation periods simply because state law may fail to provide a perfect analogy: "We stress that our holding today should not be taken as a departure from prior practices in borrowing limitations periods for federal causes of

action, *in labor law or elsewhere*. . . . [R]esort to state law remains the norm for borrowing of limitations periods [unless] a rule from elsewhere in federal law *clearly* provides a closer analogy than available state statutes, and . . . the federal policies at stake and the practicalities of litigation make that rule a *significantly more appropriate* vehicle." *Id.* at 171-172 (emphasis added).

The LMRDA Limitations Issue

This is the first case presented to this Court involving the proper statute of limitations in LMRDA actions. One other court of appeals has squarely held that LMRDA suits involving union violations similar to the discipline of Clyde Davis are governed by section 10(b). *Local 1397 v. Steelworkers*, 748 F.2d 180 (3d Cir. 1984). Other courts have applied section 10(b) to LMRDA claims which were appended as an alternate theory in suits which basically complained of violations of the duty of fair representation and sought to set aside collectively-bargained compromises between union and management. *See Vallone v Teamsters Local 705*, 755 F.2d 520 (7th Cir. 1984); *Linder v. Berge*, 739 F.2d 686 (1st Cir. 1984); *Adkins v. International Union of Electrical Workers*, 769 F.2d 330, 335 (6th Cir. 1985). The issue is already engendering considerable litigation which will eventually require a decision by this Court.

Moreover, the Court of Appeals for the Second Circuit has taken precisely the opposite approach to an extension of section 10(b) outside of hybrid DFR cases, holding that its reach is limited to suits that "inevitably involve an immediate and direct impact on labor-management relations." *Monarch Long Beach Corp. v. Teamsters Local 812*, 762 F.2d 228, 231 (1985), *cert. pending*, Nos. 85-466

and 85-667. In *Monarch,* the court of appeals held that section 10(b) did not apply to a civil action under section 303 of the LMRA to enforce the secondary boycott provisions of section 8(b)(4) of the NLRA, despite the indirect involvement not only of an employer, but of a labor-management conflict as well, reasoning that the impact of the litigation itself on labor-management relations was insufficiently direct. Obviously, Davis' argument against applying section 10(b) to his case (where neither an employer nor a labor-management conflict is even indirectly involved) is *a fortiori* from *Monarch,* and the conflict in approach is yet another reason why review should be granted in this case.

The fundamental error made below and in *Local 1397* is the assumption that the NLRA is analogous to the LMRDA and that the interests and practical considerations involved make section 10(b) "a significantly more appropriate vehicle" than any state limitations period. *DelCostello,* 462 U.S. at 172. Their analysis is simple: because LMRDA cases are labor cases, and might implicate or affect, however indirectly, some facet of labor-management relations, section 10(b) must apply. On this analysis, of course, all labor cases would have a six-month limitations period, even civil rights cases (which could, after all, disrupt agreements produced by collective bargaining), but that is not the law. *Johnson v. Railway Express Agency,* 421 U.S. 454, 462 (1975); *DelCostello, supra,* 462 U.S. at 171; *Monarch Long Beach Corp., supra.*

In fact, as other courts have recognized, actions under the LMRDA are not analogous to those under the NLRA, or indeed to hybrid DFR/contract actions, and thus section 10(b) should not be applied to LMRDA suits. *Bernard v. Teamsters Local 435,* 587 F. Supp. 524 (D. Colo. 1984);

Gordon v. Winpisinger, 581 F. Supp. 234 (E.D.N.Y. 1984). A hybrid action is brought to vindicate an employee's economic rights vis-a-vis his employer under the collective bargaining agreement; if the union is involved, it is only because showing a violation of the DFR is a precondition to the right to enforce the contract against the employer, *Vaca v. Sipes,* 386 U.S. 171 (1967), and because the union may bear responsibility for a portion of the resulting economic loss. *Bowen v. Postal Service,* 459 U.S. 212 (1983). An LMRDA suit, by contrast, seeks to vindicate a union member's civil liberties or other political rights, just as an action under section 1983 against a public official or government agency might seek to redress a violation of the constitution's Bill of Rights. Furthermore, unlike the DFR, which is inferred from the NLRA itself, rights under the LMRDA were created precisely because of Congressional dissatisfaction with the failure of the NLRA, even as amended by the Taft-Hartley Act, to regulate internal union affairs and thus to protect union members from undemocratic abuses by their leaders. *See generally* McAdams, *Power and Politics in Labor Legislation* (1964). *See also Boilermakers v. Hardeman,* 401 U.S. 233, 237-241 (1971); *NLRB v. Allis-Chalmers Mfg. Co.,* 388 U.S. 175, 194-195 (1967). Thus, section 10(b) can scarcely be said to be the "most analogous" limitations period for LMRDA actions.

Another important difference between LMRDA and hybrid DFR actions is that, although the latter inevitably involve attacks on compromises between labor and management, which therefore create uncertainty about whether those compromises were lawful, LMRDA actions normally do not involve such questions. Rather, the usual question is whether discipline was imposed without due process or based on the exercise of free speech rights, sections

101(a)(2) and (5), or whether dues were improperly increased, section 101(a)(3), or whether union members have the right to examine books and records, section 201(c), or whether a union officer has misspent union funds. Section 501. Not only do these issues not involve labor peace or collective bargaining, but it is uniformly held that LMRDA actions cannot be filed against an employer. *E.g., Duncan v. Peninsula Shipbuilders Ass'n,* 394 F.2d 237, 239 (4th Cir. 1968). Thus, unlike DFR actions, most LMRDA suits have no direct impact on labor-management relations or on labor peace and stability.

As a theoretical matter, it is possible that the resolution of an LMRDA action might have some indirect impact on the collective bargaining relationship between the defendant union and some employers. If the LMRDA prevented Jimmy Hoffa from imposing a trusteeship on an errant local when it refused to cooperate in one of his labor shakedowns, labor-management relations might have been affected. If a union cannot increase its dues because the membership does not want a larger strike fund, perhaps the leadership will be more reluctant to call strikes. If a member such as Clyde Davis cannot be expelled because he criticizes union leaders, perhaps the result will be a less (or more) adversarial relationship with management. In this sense, some LMRDA actions may have an indirect impact on economic relations between unions and employers and on labor peace.

But in that sense, every labor case, including one under 42 U.S.C. § 1981, has such impact. Yet in *DelCostello* this Court said that, in labor cases as elsewhere, the normal rule applies – *i.e.,* there is a strong bias in favor of borrowing from state limitations periods instead of from federal law. 462 U.S. at 171-172. Thus, the mere existence

of the Congressional policy favoring the rapid disposition of labor disputes, which is embodied in section 10(b) and which was a primary basis for applying that limitation period to DFR suits, does not require that section 10(b) be used in actions by union members under the LMRDA.

Although delay in the filing of LMRDA suits does not pose a threat to stable labor-management relations, a statute of limitations as abbreviated as six months does pose a significant threat to union members' access to judicial protection. This Court recognized the problem in *DelCostello,* where it discussed the difficulty members have in deciding whether their rights have been violated, in finding counsel in a field in which almost all of the specialists represent either unions or employers, in finding money to pay the lawyer, and in performing all of the investigative and other prerequisites to suing. 462 U.S. at 166.

The problem is compounded because a discharged worker may have nothing to lose and much to gain by challenging his union and his employer for a violation of the DFR. By contrast, a union member who believes that the Landrum-Griffin Act has been violated, but who has not lost his job as a consequence, may have good reason to think twice before going to court over an abstract principle of justice and democracy. To do so, he must sue a labor official who controls hiring hall referrals, decides whether or not to process grievances, and has frequent conversations behind closed doors with representatives of the employer, in which tradeoffs are made as a matter of course and a hint that somebody's departure would by no means be lamented would be impossible to prove.

Moreover, despite the fact that Congress deliberately left the enforcement of the LMRDA to the initiative of

union members willing to file suit, in many LMRDA cases the individual plaintiff receives few tangible benefits. Rather, the principal beneficiary is the union membership as a whole, not to speak of the public interest in honest and democratic unions. In these circumstances, a statute of limitations that gives only a very short time for deciding whether to undertake the risk of suing will inevitably have the effect of unduly limiting the enforcement of the Act.

In the two years since this Court decided *DelCostello,* union defendants in LMRDA suits have seized upon that ruling in an effort to avoid defending union democracy cases on the merits. Two courts of appeals have squarely held that *DelCostello* applies to LMRDA actions, although the court below reached that result primarily because it considered itself bound to do so. The issue of the proper source for a statute of limitations for LMRDA actions will not, unlike the retroactive application of *DelCostello,* go away. The question is squarely presented in this case, and the Court should decide it now, before more resources of judges and litigants are expended, and union members' rights are denied.

The Retroactivity Issue

When petitioner was expelled in 1976, Florida was part of the Fifth Circuit, which had previously held in two separate cases that various state limitations periods governed union members' suits under the LMRDA: *Sewell v. Machinists,* 445 F.2d 545 (1971) (union discipline, one year), and *Dantagnan v. Longshoremen Local 1418,* 496 F.2d 400 (1974) (dues increase, ten years). *See also Woods v. IBEW Local 613,* 404 F. Supp. 110 (N.D. Ga. 1975) (equal rights, two years); *Copitas v. Retail Clerks,* 618 F.2d 1370 (9th Cir. 1980) (free speech, three years); *Mitch-*

ell v. IBEW Local 46, 100 LRRM 2935 (W.D. Wash. 1979) (equal rights, four years). Petitioner thus had every reason to believe that his complaint would be deemed timely so long as it was filed within the shortest applicable Florida limitation period, which was two years. If the Court decides, contrary to the argument above, that *DelCostello* requires that the six-month period of section 10(b) be applied to LMRDA suits, then the issue of the retroactivity of the six-month period in LMRDA actions will be squarely presented.

The standards for deciding whether to apply a civil decision retroactively were announced by this Court in *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), another case in which an employee had filed suit in reliance on the equitable doctrine of laches, which seemed to be established by strong precedent, only to be caught unawares by a decision of this Court which required application of a one-year time limit. The Court said that the retroactivity question involved "three separate factors": (1) whether the decision established a new legal principle by overruling "clear past precedent" on which litigants "may have relied," or by deciding a question of first impression whose resolution was "not clearly foreshadowed"; (2) whether, on the merits of each case, applying the new rule would retard or further its operation, in light of the history, purpose and effect of the rule; and (3) whether retroactive application would produce "substantially inequitable results." 404 U.S. at 106.

By this standard, retroactivity is plainly inappropriate in this case. First, as noted above, both the old Fifth Circuit and every other court which had considered the question at the time when this action was filed, not only had applied a state statute rather than a federal one, but had applied a

limitations period that was longer than the nine months which passed between petitioner's expulsion and the date his first action was filed. Second, to paraphrase *Chevron*, 404 U.S. at 107, "a primary purpose underlying the absorption of [section 10(b)] was to aid injured employees by affording them [a limitation period that was not too short to protect their interests] . . . . Yet retroactive application of [section 10(b)] would deprive [Davis] of any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable." And third, "it would also produce the most 'substantial inequitable results' . . . to hold that [Davis] 'slept on his rights' at a time when he could not have known the time limitation that the law imposed upon him." *Id.* at 108. It is therefore plainly inequitable to apply section 10(b) retroactively to this case.

The court below reluctantly concluded that it was bound by its previous retroactivity decision in a non-LMRDA case. However, the retroactivity of *DelCostello* to DFR cases is actually a question on which the circuits are sharply divided. *Compare Edwards v. Teamsters Local 36,* 719 F.2d 1036 (9th Cir. 1983) (not retroactive) *and Carpenter v. West Virginia Flat Glass,* 763 F.2d 622 (4th Cir. 1985) (*accord*) *with, e.g., Perez v. Dana Corp.*, 718 F.2d 581 (3d Cir. 1983) (retroactive); *and Lincoln v. Machinists District 9,* 723 F.2d 627, 630 (8th Cir. 1983) (*accord*). Perhaps even more significant than this difference of result is the widespread confusion among the lower courts about the proper way to go about applying the *Chevron* test. *See generally* Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied,"* 61 N. Car. L. Rev. 745 and 795-797 (1983).[1]

[1]In *Steelworkers Local 1397 v. Steelworkers,* 748 F.2d 180, 184-185 (3d Cir. 1984), the court addressed the retroactivity of the application of section 10(b) to LMRDA suits and decided that it would always be retroactively applied.

Thus, for example, the lower courts cannot agree about whether each factor must be satisfied to avoid retroactive effect, or whether all factors are balanced together or, if one factor is controlling, which factor that is. *E.g., Steelworkers Local 1397 v. Steelworkers,* 748 F.2d 180, 185 (3d Cir. 1984) (balance all three factors together); *Valencia v. Anderson Bros. Ford,* 617 F.2d 1278, 1288-1289 (7th Cir. 1980), *rev'd on other grounds,* 452 U.S. 205 (1981) (all three factors must point away from retroactive application); *Edwards v. Sea-Land Svce.,* 720 F.2d 857, 862 (5th Cir. 1983) (second factor controlling); *Singer v. Flying Tiger Line,* 652 F.2d 1349, 1353 (9th Cir. 1981) (most important is harm caused by detrimental reliance). They cannot agree about whether one case decides the question for the circuit, as did the court below, or whether a case-by-case or state-by-state analysis is appropriate. *E.g., Zemonick v. Consolidation Coal Co.,* 762 F.2d 381 (4th Cir. 1985). They cannot agree about whether the critical time for assessing the first factor is when the individual claim arose or the time of the decision whose retroactivity is in question. *See Simpson v. Director, Office of Workers Comp. Programs,* 681 F.2d 81, 86 and n. 8 (1st Cir. 1982). Some courts give weight to the fact that the decision in question was itself applied retroactively, even though the issue was not discussed, *Lincoln v. Machinists District 9,* 723 F.2d 627, 630 (8th Cir. 1984), and the Sixth Circuit takes the view that only this Court has the power to deny a decision retroactive effect. *Smith v. General Motors Corp.,* 747 F.2d 372 (1984) (en banc). Other courts do not find that issue worth considering, and indeed, in *Del Costello* the Court specifically found it unnecessary to decide the issue of retroactivity. 462 U.S. at 158 n. 11.

The result of all this confusion is that the lower courts are faced with a large number of cases raising retroactivity issues. Because *DelCostello* was decided in June, 1983, there are not very many cases left in the pipeline in which its retroactive application to hybrid DFR actions is still at issue. But if the six-month period is held applicable to LMRDA suits, the retroactivity of that holding will again consume substantial resources of both litigants and courts. Moreover, the meaning of the *Chevron* test generally is an issue which arises every time the Court issues a ruling on a statute of limitations issue or indeed many other issues. In short, this is a question of substantial importance that will not disappear, and on which the lower courts are in complete disarray. Thus, even if the Court decides that section 10(b) applies to LMRDA suits, it should also consider the retroactivity of that ruling.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison
Arthur L. Fox II

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

Jere D. McWinn
P.O. Box 985
Eagle, Idaho 83616

Of Counsel

November 1985

Clyde L. DAVIS, Jr., an individual, Plaintiff-Appellant,

v.

UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURE IMPLEMENT WORKERS OF AMERICA, et al., Defendants-Appellees.

No. 84-3550.

United States Court of Appeals,
Eleventh Circuit.
July 22, 1985

Before RONEY and HILL, Circuit Judges, and TUTTLE, Senior Circuit Judge.

JAMES C. HILL, Circuit Judge:

Plaintiff/appellant Clyde Davis commenced this action under the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 401 *et. seq.*, alleging that he was expelled from his union in retaliation for exercising his statutory right of free speech protected under 29 U.S.C. § 411(a)(2). The district court granted summary judgment in favor of defendants/appellees on the ground that Davis failed to exhaust his internal union procedures before seeking judicial intervention. We do not reach the issue of exhaustion, determining instead that this suit is barred by the six-month statute of limitations borrowed from section 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(b).

I. FACTS

From 1960 through 1976, Davis was an employee of Ford Motor Company and a member of the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 970. During those years he held a variety of local union offices, including president and vice-president.

On March 16, 1976, Davis was charged with several violations of the UAW Constitution, based on alleged threats and intimidation of union members and threats to destroy the local union.[1] In April, 1976, a trial was held before a union trial board in Jacksonville. Davis was served with timely notice of this trial, but chose not to attend the trial or offer any defense, allegedly because of his apprehension that there might be physical altercations between himself and others. On September 14, 1976, Davis was informed that he had been found guilty of the violations as charged, and that he had been expelled from the local and international unions.[2]

Rather than availing himself of available internal UAW appeals processes, *see generally Monroe v. International Union, UAW,* 723 F.2d 22, 24 (6th Cir.1983) (description of UAW appeal procedures); UAW Constitution, art. 33 (1977), Davis filed suit against the local and international unions. In June, 1977, he filed a complaint in Florida state court seeking damages for mental anguish, resulting from his alleged wrongful expulsion from the unions. This suit was removed to federal court, remanded to state court, and removed back to federal court, for good, in August, 1978. Meanwhile, in June, 1978, appellant filed a complaint in federal court alleging wrongful expulsion from the unions contrary to federal law and the unions' rules, and seeking damages for loss of wages and physical and mental suffering. In June 1981, the two cases were consolidated.

In June, 1981, and again in July, 1982, appellant moved to file an amended complaint. In October, 1983, although the court had not yet ruled on the motions, appellant filed an amended complaint which added allegations that appellant's expulsion was

[1] A copy of the notice of charges filed against Davis is attached as an appendix to this case. The majority of these charges appear to be allegations that Davis was vocal in his criticism of union officials and union management. The expression of views, arguments and opinions, including criticism of union management, is protected under 29 U.S.C. § 411(a)(2). *See Airline Maintenance Lodge 702 v. Loudermilk,* 444 F.2d 719, 721-24 (5th Cir.1971); *Fulton Lodge No. 2 v. Nix,* 415 F.2d 212, 218 (5th Cir. 1969).

[2] Although expelled from the Unions, Davis apparently did remain at his job with Ford for several more years.

motivated by plaintiff's criticism of union officers, in violation of his right to free speech under section 101(a)(2) of the LMRDA, 29 U.S.C. § 411(a)(2).[3] Appellant also added allegations that the UAW's internal appeals procedures were unreasonable and that it would be futile for him to exhaust them, and that exhaustion was not necessary because free speech violations were involved. In April, 1984, appellant's motions to amend were denied and the amended complaint was stricken.

In July, 1984, the district court granted the appellees' motion for summary judgment on the ground that appellant did not exhaust available internal UAW appeals procedures before seeking judicial intervention.[4] Although the court had stricken Davis'

---

[3] The LMRDA created a statutory "Bill of Rights of Members of Labor Organizations," 29 U.S.C. § 411-15, which included a right to freedom of speech and assembly:

> Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

29 U.S.C. § 411(a)(2).

[4] Section 101(a)(4) of the LMRDA, 29 U.S.C. § 411(a)(4), entitled "Protection of the right to sue," provides in relevant part, that:

> No labor organization shall limit the right of any member thereof to institute an action in any court . . . *Provided*, that any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof.

Section 411(a)(4) thus provides for permissive exhaustion, at the discretion of the trial judge. In exercising this discretion, a court must determine "whether the available [union] procedures are adequate and reasonable in light of the facts of the particular case." *NLRB v. Marine Workers*, 391 U.S. 418, 428, 88 S.Ct. 1717, 1723, 20 L.Ed.2d 706 (1968). At least three factors are relevant to this inquiry:

> first, whether the union officials are so hostile to the employee that he could not hope to obtain a fair hearing on his claim; second, whether the internal union procedures would be inadequate either to reactivate the employee's grievance or to award him the full relief he seeks . . .; and third, whether exhaustion of inter-

amended complaint, its order granting summary judgment addressed the allegations in the amended complaint. The court found that the UAW's intricate appellate grievance procedures were reasonable and adequately safeguarded a union member's interests; and that Davis, as a sixteen-year member who had held several local union offices, could not complain about lack of knowledge of the grievance procedures. It found further that appellant's alleged free speech claims involved "threats and intimidation. . . against other union members as well as alleged disparaging statements against the organization;" that these areas touched on the union's internal affairs; and thus that the conduct was not protected free speech either in the traditional sense or within the scope of 29 U.S.C. § 411(a)(2).

II. DISCUSSION

Appellant contends that the district court abused its discretion in granting summary judgment for failure to exhaust. He argues that exhaustion is not required when a free speech violation under the LMRDA is involved; that his allegations involve issues in the "public domain" which internal union procedures are inadequate to deal with; and that exhaustion should not be required because the UAW's internal remedies are unreasonable, inadequate, and unfair.

We do not address the merits of appellant's arguments on exhaustion, but instead affirm the grant of summary judgment on the basis that appellant's cause of action, filed at least eleven months after he was informed of his expulsion from the unions, is barred by the six-month statute of limitations borrowed from § 10(b) of the NLRA, 29 U.S.C. § 160(b).[5]

---

nal procedures would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim.

Clayton v. International Union, UAW, 451 U.S. 679, 689, 101 S.Ct. 2088, 2095, 68 L.Ed.2d 538 (1981).

[5] The UAW raised the statute of limitations issue in district court, but the district court declined to rule on it since it had granted summary judgment for failure to exhaust. The parties submitted supplemental briefs to this court on the statute of limitations issue.

Since the LMRDA does not provide an express limitations period for suits brought pursuant to it, a federal court must "borrow" the most appropriate limitations period from some other source. *DelCostello v. International Brotherhood of Teamsters,* 462 U.S. 151, 103 S.Ct. 2281, 2287, 76 L.Ed.2d 476 (1983). Generally, this involves applying the statute of limitations of the most closely analogous state action. *Id.*

In *DelCostello*, however, the Supreme Court applied the six-month limitations period from § 10(b) of the NLRA[6] to a "hybrid" section 301[7]/fair representation suit brought by an employee against his employer and his union.[8] The Court first noted that it was improper to apply mechanically a state statute of limitations to a federal statutory cause of action when such an application would frustrate federal policies, and then emphasized the important federal interests in promoting the formation of collective bargaining agreements and the speedy, private settlement of disputes under them. *Id.* at 2289. The Court felt that a hybrid section 301/fair representation claim amounted to a "direct challenge" to the private settlement of disputes under a collective bargaining agreement; and that such a claim had no close analogy in ordinary state law. *Id.* at 2291. Therefore, the Court determined that the NLRA unfair labor practices statute, 29 U.S.C.

---

[6] Section 10 of the NLRA, 29 U.S.C. § 160, sets forth the NLRB's powers to prevent unfair labor practices. Section 10(b) provides, in relevant part:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.

29 U.S.C. § 160(b).

[7] Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

[8] This suit alleged that the employer had breached a provision of the collective bargaining agreement and that the union had breached its duty of fair representation by mishandling the ensuing grievance and arbitration proceedings. 103 S.Ct. at 2285.

§ 160, was the closest analogy to the § 301/fair representation claim—because of the similarity in the rights asserted in fair representation claims and unfair labor practice charges (both involving allegations of unfair, arbitrary, or discriminatory treatment of workers by unions), and the similarity of considerations relevant to the choice of a limitations period in the two contexts. *Id.* at 2293-94.

> In § 10(b) of the NLRA, Congress established a limitations period attuned to what is viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system. That is precisely the balance at issue in this case. The employee's interest in setting aside the 'final and binding' determination of a grievance through the method established by the collective-bargaining agreement unquestionably implicates 'those consensual processes that federal labor law is chiefly designed to promote—the formation of the . . . agreement and the private settlement of disputes under it.' [*International Union, United Auto., Aerospace and Agr. Implement Workers of America UAW v.*] *Hoosier* [Cardinal Corp., 383 U.S. [, 696] at 702, 86 S.Ct. [, 1107] at 1111 [, 16 L.Ed.2d 192 (1966)]. Accordingly, '[t]he need for uniformity' among procedures followed for similar claims, *ibid.*, as well as the clear congressional indication of the proper balance between the interests at stake, counsels the adoption of § 10(b) of the NLRA as the appropriate limitations period for lawsuits such as this.

Id. at 2294 *(quoting United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 70-71, 101 S.Ct. 1559, 1567-1568, 67 L.Ed.2d 732 (Stewart, J., concurring)). Thus, the Court applied the six-month limitations period from 29 U.S.C. § 106(b), although it cautioned that its holding should not be taken as a departure from the usual practice of borrowing state limitations periods for federal causes of action, "in labor law or elsewhere." *Id.*, 103 S.Ct. at 2294.

Since *DelCostello,* three Circuit Courts of Appeals have relied on the Supreme Court's analysis in *DelCostello* to apply the same six-month limitations period to suits brought under section 102 of the LMRDA, 29 U.S.C. § 412. *Vallone v. Local Union No. 705,* 755 F.2d 520, 521-22 (7th Cir.1984) (suit alleging violations of 29 U.S.C. § 411, including right to free speech); *Local Union 1397 v. United Steelworkers of America,* 748 F.2d 180 (3d Cir.1984) (alleging violations of § 411, including right to free expression); *Linder v. Berge,* 739 F.2d 686, 690 (1st Cir.1984) (alleging violations of 29 U.S.C. § 414, for failure to provide with copy of collective bargaining agreement).[9] We feel constrained by the rationale of *DelCostello* and the holdings of our sister circuits to reach the same conclusion in the present case.

The gist of appellant's complaint is that he was unlawfully expelled from the UAW in retaliation for exercising his rights of free speech, guaranteed by section 101(a)(2) of the LMRDA, in criticizing union officials and union management policies. As in *DelCostello*, there are no closely analogous actions under the state law.[10] In addition, there is a "family resemblance" between rights asserted under the LMRDA and unfair labor practice charges under the NLRA, in that both seek to "protect[]. . . individual workers from arbitrary actions by unions, which have been appointed the exclusive representatives of such individuals in the workplace." *Local Union 1397,* 748 F.2d at 183; *see DelCostello,* 103 S.Ct. at 2293.

However, we note an important distinction between the present action and a hybrid § 301/fair representation claim as was alleged in *DelCostello. DelCostello* employed a balancing analysis—the Supreme Court applied section 10(b)'s six-month limitations period only after concluding that such a period struck

---

[9] *Accord, Turco v. Boilermakers,* 592 F.Supp. 1293 (E.D.N.Y.1984); *Adkins v. General Motors,* 573 F.Supp. 1188 (S.D.Ohio 1983). *But see Bernard v. Delivery Drivers,* 587 F.Supp 524 (D.Colo.1984); *Gordon v. Winpisinger,* 581 F.Supp. 234 (E.D.N.Y.1984).

[10] Appellant urges that we borrow Florida's four-year statute of limitations applicable to actions founded on negligence or statutory liability, 7 Fla.Stat. § 95.11(3)(a), (f); or the two-year period applicable to professional malpractice actions. *Id.* at § 95.11(4)(a).

a proper balance between the national interests in stable bargaining relationships and finality of private settlements thereunder, and the employee's interest in setting aside an unjust settlement under the collective bargaining system. 103 S.Ct. at 2294. The present action, alleging a violation of statutorily-protected free speech, involves a different balance of interests. First, an action alleging a violation of 29 U.S.C. § 411 is brought only against the union; the employer is not involved. Therefore, the national interests in stable labor-management bargaining relationships and the speedy, final resolution of disputes under a collective bargaining agreement are not implicated.[11] Accordingly, the need for national uniformity in the application of limitation periods to such an action is not as great. *See DelCostello,* 103 S.Ct. at 2289; *Auto Workers v. Hoosier Corp.,* 383 U.S. 696, 702, 86 S.Ct. 1107, 1111, 16 L.Ed.2d 192 (1966). Furthermore, a union member's interest in protection against the infringement of his rights to free speech rises to a national interest, as embodied in section 101(a)(2) of the LMRDA, 29 U.S.C. § 411(a)(2), and thus seems of greater importance than an employee's interest in setting aside an individual settlement under a collective bargaining agreement.

Nevertheless, we feel constrained by the analysis employed in *DelCostello* to apply the same limitations period to the present lawsuit. In *DelCostello,* the Supreme Court found a strong connection between the national interest in labor peace and the necessity of a short time period in which to bring an action based on a labor union's duty of fair representation to its members. We believe we are bound to find a similar connection between labor peace and an action based on a union's alleged mistreatment of its

[11] We realize that the Third Circuit has concluded that the rapid resolution of internal union disputes such as the present is necessary to maintain the federal goal of stable collective bargaining relationships, because "dissension within a union naturally affects that union's activities and effectiveness in the collective bargaining arena." *Local Union 1397,* 748 F.2d at 184. This link appears rather tenuous in the situation of a single dispute between an individual union member and the union.

members by the denial of statutorily protected rights.[12] We accordingly hold that the six-month limitations period of 29 U.S.C. § 160(b) applies to LMRDA actions brought under 29 U.S.C. § 412 alleging union violations of 29 U.S.C. § 411.[13]

---

[12] In *Erkins v. United Steelworkers of America*, 723 F.2d 837, 839 (11th Cir.), *cert denied*, — U.S. — 104 S.Ct. 3517, 82 L.Ed.2d 825 (1984), this circuit held that the six-month limitations period of 29 U.S.C. § 160(b) applies to a breach of duty of fair representation suit brought against a union, even when there is no corresponding section 301 action against the employer. This reinforces our conclusion that we are bound to apply the same limitations period to the present cause of action filed solely against the union.

[13] We do note a potential problem with applying the six-month limitations period to a suit alleging a violation of § 101 of the LMRDA, 29 U.S.C. § 411. A cause of action under section 411 accrues when the plaintiff union member discovers, or in the exercise of reasonable diligence should have discovered, the act constituting the alleged violations; at which time the statute of limitations begins to run. *See Erkins v. United Steelworkers of America*, 723 F.2d 837, 839 (11th Cir.) *cert. denied*, — U.S. —, 104 S.Ct. 3517, 82 L.Ed.2d 825 (1984); *Vallone*, 755 F.2d at 522. However, section 411(a)(4) provides that a union member may be required to exhaust reasonable internal union procedures for up to four months before proceeding with a suit under section 412. *See supra* note 4. Thus, union members might be forced into a "Catch-22" situation in which they could be barred from suing the union if they wait to sue for more than six months while exhausting union remedies, but could be dismissed from federal court for failure to exhaust internal remedies if they file suit within the limitations period without seeking to exhaust. *Cf. Vallone*, 755 F.2d at 522 (plaintiff argues that federal claim under § 411 does not accrue until final disposition of grievances filed with unions).

Two possible solutions come to mind. First, the limitations period might be tolled during the time a union member is exhausting his union remedies. *Cf. Gentilviso v. New York Public Library*, 589 F.Supp. 587, 592 (S.D.N.Y.1984) (general federal rule on tolling of limitations period). Second, a court could require the filing of the lawsuit within six months, but stay the judicial proceedings pending completion of exhaustion of union remedies. *Cf. Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 465, 95 S.Ct. 1716, 1722, 44 L.Ed.2d 295 (1975) (suggesting that plaintiff might ask court to stay proceedings until administrative efforts completed); *Vallone*, 755 F.2d at 522 (plaintiffs need not await final outcome of grievance before filing suit against union).

We need not resolve this potential problem in the present case, since appellant filed his first suit approximately eleven months after his cause of action accrued (when he was notified of his expulsion from the union), without ever seeking to exhaust union remedies in the intervening time.

Appellant contends that this limitation period should not be applied retroactively to his claim, citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 105-109, 92 S.Ct. 349, 354-357, 30 L.Ed.2d 296 (1971). We cannot agree. We are bound by our holding in *Rogers v. Lockheed-Georgia Co.*, 720 F.2d 1247 (11th Cir.1983), *cert denied*,—U.S.—, 105 S.Ct. 292, 83 L.Ed.2d 227 (1984), to apply the six-month limitations period retroactively.[14]

Appellant was notified of his expulsion from the Local and International UAW on September 14, 1976. He did not file suit until June, 1977. Therefore, summary judgment in favor of the defendants/appellees is AFFIRMED because the appellant's claims are barred by the statute of limitations.

APPENDIX

In accordance with Article 17 Section 10 and Article 31 Section 1 & 2 of the Constitution of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Charges have been made against Clyde L. Davis, member of Local 970 UAW.

In accordance with Article 31 Section 3, the Local Union Executive Board of Local 970 UAW reviewed the charges listed below on March 11, 1976 and did not find them to be improper.

1. "There are two or three people I intend to get rid of to make this a better warehouse." (A threat)

---

[14] The present case appears closely analogous to the situation in the *Chevron Oil* case, where the Supreme Court held that, in an action commenced and prosecuted in reasonable belief (based on federal court decisions) that a short one-year statute of limitations did not apply, a United States Supreme Court decision requiring the contrary conclusion, announced while pretrial discovery proceedings were pending, would not be applied retroactively to bar the action. 404 U.S. at 105-09, 92 S.Ct. at 354-357. However, we are bound by our precedent in *Rogers*, which conclusively determined that the six-month limitations period borrowed from 29 U.S.C. § 160(b) should be applied retroactively in order to further the federal labor policies inherent in the rule and to prevent the inequitable results of different state limitations periods being applied to essentially similar federal causes of action. 720 F.2d at 1250.

2. Using a Brothers own telephone call against him to satisfy his own sadistic humor. (Refer to grievance A-70354, (Intimidation)

3. Davis has belittled this Local in every way he could with his statements

a. "Since I went out of office the Union has become useless."

b. "When I become foreman I will not have any trouble controlling the committee since it is the worst we have ever had."

c. "If Richard Redding slows down in his work it will be easy to stick it in his ass."

d. "I could write Bob Adams up at any time I want to."

4. Undermining Union officers in an attempt to create dissension between the Local Union President and Building Chairman. Davis's use of twisting the appropriate related acts to show that F. Shaffer was responsible for the Companies discriminatory practice of making up lost time. Davis stated to the Chairman the reason we had to stop letting people make up time was because of F. Shaffer. This was found to be untrue and it was Davis himself that stopped this procedure. (Refer to grievance A-70357)

The above allegations can be substantiated in part or in whole by the following members: Tommy L. Crego, Larry E. Carpenter, Frank Y. Shaffer, Frank G. Atkinson, R.H. Adams, Hayward Mathis, and D.D. Beecher.

C.L. Davis has made the statement that he would destroy this Local Union. He made his intentions very clear at the last Union meeting he attended. By the use of false accusations to the membership that we were in imminent danger of getting an Administrator due to poor leadership by the present Union Officers. He made false accusations that the Financial Secretary was not legitimately working on the books when paid by the Union to do so. This was found to be untrue since Davis had no proof to substantiate his charge. A charge of this nature by Davis without substantial evidence can only be considered a slanderous accusa-

tion in an attempt to create dissension in the Local Union and weaken the internal structure.

The above allegations can be substantiated by Tommy L. Crego.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CLYDE L. DAVIS, JR.,
Plaintiff,
vs. No. 78-314-Civ-J-16
UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO, LOCAL 970, etc., et al.,
Defendants.

CLYDE L. DAVIS, JR.,
Plaintiff,
vs. No. 78-531-Civ-J-16
UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL-CIO LOCAL 970, etc., et al.,

ORDER

This Court has for consideration Defendants' motion to dismiss and motion for summary judgment filed in Case No. 78-314-Civ-J-16 and Defendants' motion for summary judgment filed in Case No. 78-531-Civ-J-16. A hearing on the pending motions was held on May 25, 1984, at which time the Court directed the parties to file supplemental briefs on the issues raised therein. On representation by Defendants' counsel at the hearing that the arguments raised in the motion to dismiss in Case No. 78-314-Civ-J-16 are subsumed by those contained in the motions for summary judgment, the Court will treat the same as motions for summary judgment.

Briefly, and dismissing the procedural sparring that has transpired, the gravamen of Plaintiff's complaint in both cases is the claim that Plaintiff was wrongfully expelled from the Defendant unions after sixteen (16) years of membership. Plaintiff, DAVIS, seeks damages consisting of lost wages, and physical and mental suffering for this alleged wrongful expulsion. Defendants, on the other hand, posit that in 1976 Plaintiff was charged by the Local Union of, among other things, making a threat that he would bring about the discharge from employment of two or three people, that he had intimidated another member of the union, that he belittled the union with various statements, which included apparent threats against two particular union members to impair their employment status. At the union trial held on the charges, Plaintiff was expelled from the union. Plaintiff acknowledges receiving by registered mail both the notice of the charges to which he would be tried and the notice of the place and date of trial. Nevertheless, Plaintiff states he did not attend the trial "because of apprehension that there might be physical altercations between myself and someone else." (Plaintiff's Affidavit in Opposition to Defendants' motion for summary judgment, May 21, 1984.)

Plaintiff's federal labor law claims fall under the provisions of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 401, *et seq.;* and specifically 29 U.S.C. § 411. Defendants principally argue in the motions for summary judgment that DAVIS' claims should be dismissed for failure to exhaust his internal union remedies. In their supplemental memorandum filed on June 8, 1984, Defendants raise for the first time the argument that Plaintiff's claims under the LMRDA are barred by the six-month statute of limitations found in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b).

As a general rule, the permissive exhaustion doctrine of 29 U.S.C. § 411(a)(4) allows courts in their discretion to determine whether union members must first exhaust internal union remedies before seeking judicial relief and intervention. This Court must decide whether the internal union grievance pro-

cedure of the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) is unreasonable, *Keene v. International Union of Operating Engineers, Local 624, AFL-CIO,* 569 F.2d 1375 (5th Cir. 1978); or futile, *Fulton Lodge No. 2 of the Intn'l Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Nix,* 415 F.2d 212 (5th Cir. 1969); to determine whether DAVIS is required to exhaust his intra-union remedies.

Far from being unreasonable, the UAW has implemented an intricate appellate grievance procedure that adequately safeguards a union member's interests. As recently described by one Circuit panel:

> The UAW Constitution requires its members in the case of a complaint or grievance against it to exhaust internal remedies. Under the constitution, an aggrieved member is first bound to seek relief from the membership of his Local, and in the event of failure there to petition the UAW Executive Board. The final source of internal relief is either the Constitutional Convention Appeals Committee or the Public Review Board. (Footnotes omitted)

Monroe v. International Union, UAW, et al., 723 F.2d 22, 24 (6th Cir. 1983). Both the *Monroe* and *Fulton Lodge No. 2* courts have noted that an impartial review board such as the UAW's Public Review Board cures the infirmities which inherently make union grievance procedures unreasonable. *Monroe,* at 24 n.3; *Fulton Lodge No. 2,* at 216 n.10 (the union is the victim of its own appellate review structure).

DAVIS presents a myriad of arguments on why exhaustion in this case would be futile. He argues that his right of free speech, protected by 29 U.S.C. § 411(a)(2), was violated by the defendants, and the courts have been hesitant to require exhaustion where such rights are raised. DAVIS also argues that the charges against him were vague and chilled his right of free speech. Parenthetically, DAVIS raises questions as to his knowledge, as well as the adequacy and availability of the internal union procedures.

This Court finds that DAVIS' alleged ignorance of the UAW's

grievance procedure does not bespeak of a sixteen-year member of the union who admits to holding the following union offices: Chairman of the Bargaining Committee; Committeeman; President of Local Union #970; Vice President of Local Union #970; Acting Financial Secretary of Local Union #970; and Financial Secretary of the Statewide Community Action Program of the International Union. Indeed, as a dues-paying member of the UAW, DAVIS would have received a copy of *Solidarity*, the union newsletter, which in a number of publications specifically referred to the rights of union members to appeal under the UAW Constitution. DAVIS should not now be heard to complain of lack of knowledge. "A union member's duty to become familiar with the internal appeals procedure is implicit in his obligation to exhaust those remedies prior to seeking judicial relief." (citations omitted). *Miller v. General Motors Corporation, et al.*, 675 F.2d 146, 150 (7th Cir. 1982).

DAVIS also raises a futility argument that the charges against him were vague. The LMRDA provides statutory safeguards against improper disciplinary action by a union against its members by requiring that as a prerequisite to expulsion of a union member, a union must in part serve the member with written specific charges. 29 U.S.C. § 411(a)(5).

The Court finds DAVIS' argument without merit in light of his letter dated February 14, 1977 to Dave Moore, an official of the International Union, wherein Davis attaches his own version and explanation as to each of the charges against him. It is unimaginable how Plaintiff can now argue vagueness when in 1977 he rebuked each charge against him with specificity; associating names and dates with particular incidents.[1]

As the Supreme Court has stated on examination of the legislative history of the specificity requirement of 29 U.S.C. § 411(a)(5), the provision demands that the charges must be

[1] It should be noted that Plaintiff was expelled from the union in mid-1976 and originally commenced this action in state court in June 1977.

specific enough to inform the accused member of the offense that he has allegedly committed. *International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO v. Hardeman*, 401 U.S. 233, 245; 91 S.Ct. 609, 616 (1971). In the instant case, the Court finds that the charges brought against DAVIS were specific and comported with the requirement of 29 U.S.C. § 411(a)(5).

Plaintiff argues that exhaustion is not required because his free speech rights protected by 29 U.S.C. 411(a)(2) were violated; and, in a similar vein, because the union charges brought against him fall within the range of free speech guaranteed under the LMRDA.

Section 101(a)(2) of the LMRDA, 29 U.S.C. § 411(a)(2) provides:

> Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

As the proviso demonstrates, a union member's rights to free speech and assembly are not absolute. Neither are these statutory rights equivalent to the rights established by the First Amendment. *United Steelworkers of America, AFL-CIO-CLC v. Sadlowski*, ____ U.S. ____, 102 S.Ct. 2339 (1982). While exhaustion will not be waived *per se* when a free speech violation is alleged, the Court may weigh this factor as one basis in determining, in its discretion, whether Plaintiff is excused from exhausting intra-

union remedies. *Keefe Brothers v. Teamsters Local Union No. 592,* 562 F.2d 298, 303 (4th Cir. 1977).

In support of exhaustion, Plaintiff cites to two cases wherein the courts have been particularly hesitant in requiring exhaustion when such rights are raised. *Keefe Brothers,* 562 F.2d 298 (4th Cir. 1977); *Semancik v. United Mine Workers of America District #5,* 466 F.2d 144 (3d Cir. 1972). Those cases, however, are distinguishable in one important respect. Exhaustion was not required because of the obvious futility of requiring it since the grievance process was controlled by the aggrieved union member's political opponents. Here, the Court has found that the UAW's Public Review Board remedies this concern for impartiality. Given the reasonable review procedure of the UAW, the Court finds that exhaustion will not be waived automatically in this instance.

Finally, the Court must decide whether the charges brought against DAVIS, nonetheless, chill any of his statutory free speech rights. 29 U.S.C. § 411(a)(2) envisions a balancing test wherein the union member's rights of free speech and assembly are weighed against the union's interest in pursuing its legal or contractual obligations without interference or hindrance. *Rutledge v. Aluminum, Brick and Clay Workers International Union,* 681 F.2d 1352 (11th Cir. 1982); *Airline Maintenance Lodge 702, I.A.M. & A.W. v. Loudermilk,* 444 F.2d 719 (5th Cir. 1971).

Assuming, without deciding, that some of Plaintiff's activities may fall within the scope of protection afforded by the LMRDA, the Court is of the opinion in balancing the benefit and harm that the Defendants' institutional interest in union solidarity and self-governance outweighs Plaintiff's presumptive statutory rights. To allow DAVIS to circumvent the appellate review process, found to be a model grievance procedure, would tarnish the union's interest in protecting the viability of that process.

This is especially true given the nature of Plaintiff's activities. The Court is not faced with activity associated with a union election campaign. In that setting, the freedom of speech and

assembly provision of 29 U.S.C. § 411(a)(2) "is particularly critical, and deserves vigorous protection." *Sadlowski,* at 2346. Rather, the Court here confronts activities amounting to alleged threats and intimidation by DAVIS against other union members as well as alleged disparaging statements against the organization. These are areas that touch on the union's legitimate internal affairs. As alleged, this conduct cannot be considered protected free speech in the traditional sense, and, on balance, within the scope of statutory protection under the LMRDA.

In conclusion, the Court finds that there are no genuine issues of material fact and that Plaintiff, CLYDE L. DAVIS, JR., should not be relieved from exhausting his intra-union remedies.

Finding Defendants' exhaustion claim dispositive, the Court will not concern itself with the merits of the statute of limitations claim.

Accordingly, it is now:

ORDERED and ADJUDGED:

1. In Case No. 78-314-Civ-J-16, Defendants' motion for summary judgment is hereby GRANTED, and the Clerk of this Court is ordered and directed to enter final summary judgment for the Defendants.

2. In Case No. 78-531-Civ-J-16, Defendants' motion for summary judgment is hereby GRANTED, and the Clerk of this Court is ordered and directed to enter final summary judgment for the Defendants.

DONE and ORDERED in Chambers at Jacksonville, Florida this 5 day of July, 1984.

/s/ John H. Moore, Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-3550

CLYDE L. DAVIS, JR., An Individual,
Plaintiff-Appellant,

v.

UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Florida

Before Roney and Hill, Circuit Judges, and Tuttle, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel:

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, affirmed:

It is further ordered that the plaintiff-appellant pay to the defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

Entered: July 22, 1985
For the Court: Spencer D. Mercer, Clerk

Issued as Mandate: August 13, 1985

Supreme Court, U.S.
FILED
JAN 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-844

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CLYDE L. DAVIS, JR.,
Petitioner,

v.

UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UNITED AUTOMOBILE WORKERS LOCAL 970, and CLAUDE PEREIRA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

JORDAN ROSSEN
(Counsel of Record)
DANIEL W. SHERRICK
8000 E. Jefferson Avenue
Detroit, Michigan 48214
(313) 926-5216
Attorneys for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the statutorily prescribed statute of limitations found in § 10(b) of the National Labor Relations Act should govern actions brought under the Labor-Management Reporting and Disclosure Act.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
COUNTER-STATEMENT OF FACTS	1
ARGUMENT	5
I. Limitations Period	5
II. Retroactivity	10
CONCLUSION	12

TABLE OF AUTHORITIES

Cases Page

Adkins v. International Union of Electrical Workers, 769 F.2d 330 (6th Cir. 1985) 6, 9
Barnett v. United Air Lines, 738 F.2d 358 (10th Cir. 1984) 11
Bernard v. Delivery Drivers, 587 F. Supp. 524 (D. Colo. 1984) 6
Bigbie v. Teamsters, —— F. Supp. ——, 114 LRRM 2468 (N.D. Ill. 1983) 6
Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 10
Davis v. UAW, 765 F.2d 1510 (11th Cir. 1985) ..... *passim*
DelCostello v. Teamsters, 462 U.S. 151 (1983) ..... *passim*
Edwards v. Teamsters, 719 F.2d 1036 (9th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 1599 (1984) 11
Erkins v. Steelworkers, 723 F.2d 837 (11th Cir. 1984), *cert. denied*, —— U.S. ——, 104 S.Ct. 3514 (1984) 7-8
Gordon v. Winpisinger, 581 F. Supp. 234 (E.D.N.Y. 1984) 6
Graves v. Smith's Transfer Corp., 736 F.2d 819 (1st Cir. 1984) 11
Gray v. Meat Cutters, 736 F.2d 1055 (5th Cir. 1984) 11
Landahl v. PPG Industries, 746 F.2d 1312 (7th Cir. 1984) 11, 12
Legutko v. Local 816, 606 F. Supp. 352 (E.D.N.Y. 1985) 6
Lincoln v. District 9, 723 F.2d 627 (8th Cir. 1983) 11
Linder v. Berge, 739 F.2d 686 (1st Cir. 1984) 6
Local 1397 v. Steelworkers, 748 F.2d 180 (3rd Cir. 1984) ..... *passim*
McConnell v. Teamsters, 606 F. Supp. 460 (S.D.N.Y. April 10, 1985) 6
Miller v. Jeep Corp., 774 F.2d 111 (6th Cir. 1985) 6
Monarch v. Soft Drink Workers, 762 F.2d 228 (2nd Cir. 1985), *cert. denied*, —— U.S. ——, 54 U.S.L.W. 3392 ..... 8, 9-10

TABLE OF AUTHORITIES—Continued

Page

Murray v. Branch Motor Express, 723 F.2d 1146 (4th Cir. 1983), *cert. denied*, —— U.S. ——, 53 U.S.L.W. 3287 11
NLRB v. Allis-Chalmers, 388 U.S. 175, 181 (1967) 9
Perez v. Dana Corp., 718 F.2d 581 (3rd Cir. 1983) 11, 12
Rogers v. Lockheed Georgia, 720 F.2d 1247 (11th Cir. 1983), *cert. denied*, —— U.S. ——, 53 U.S.L.W. 3287 11
Sisco v. Consolidated Rail Corp., 732 F.2d 1188 (3rd Cir. 1984) 8
Smith v. General Motors, 747 F.2d 372 (6th Cir. 1984) (en banc) 11
Turco v. Boilermakers, 592 F. Supp. 1293 (E.D. N.Y. 1984) 6
Vallone v. Teamsters, 755 F.2d 520 (7th Cir. 1984) 6, 9
Welyczko v. U.S. Air, 733 F.2d 239 (2nd Cir. 1984), *cert. denied*, —— U.S. —— 11
Yanick v. Nielsen, —— F. Supp. ——, 115 LRRM 3295 (N.D. Ca. 1983) 6

Statutes

National Labor Relations Act 29 U.S.C. § 151 *et seq.*, as amended

§ 8(b)(1), 29 U.S.C. § 158(b)(1) 9
§ 10(b), 29 U.S.C. § 160(b) ..... *passim*

Labor-Management Relations Act of 1947

§ 301, 29 U.S.C. § 185 ..... *passim*
§ 303, 29 U.S.C. § 187 ..... 8, 9

Labor Management Reporting and Disclosure Act 29 U.S.C. § 401 *et seq.*

§ 101(a)(2), 29 U.S.C. § 411(a)(2) ..... *passim*
§ 102, 29 U.S.C. § 412 ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-844

CLYDE L. DAVIS, JR.,

Petitioner,

v.

UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UNITED AUTOMOBILE WORKERS LOCAL 970, and CLAUDE PEREIRA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

COUNTER-STATEMENT OF FACTS

For most of the period between 1960 and 1976, Petitioner Clyde Davis was an hourly employee of Ford Motor Company and a member of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and its Local 970 (hereafter "UAW"). During those years Davis held a number of offices within the Local, including President and Vice-President.

On March 16, 1976, Davis was charged with several violations of the UAW Constitution. These charges were "based on alleged threats and intimidation of union members and threats to destroy the local union." (App. 2a)[1]

"In April, 1976, a trial was held before a union trial board in Jacksonville. Davis was served with timely notice of this trial, but chose not to attend the trial or offer any defense, allegedly because of his apprehension that there might be physical altercations between himself and others. On September 14, 1976, Davis was informed that he had been found guilty of the violations as charged, and that he had been expelled from the local and international unions." (App. 2a). "Although expelled from the Unions, Davis apparently did remain at his job with Ford for several more years." (*Id.* n.2)

"Rather than availing himself of available internal UAW appeals processes,[2] . . . Davis filed suit against the local and international unions. In June, 1977, he filed

---

[1] The bulk of this Counter-Statement of Facts is taken verbatim from the decision of the Court of Appeals. References to the Petition for Certiorari will be in the form Pet. ——; references to the Appendix to the Petition in the form App. ——.

[2] Petitioner erroneously states that Davis "received no response" to a February 1977 letter to a union official. In fact, the appropriate official responded in writing to Mr. Davis and attempted to inform him that appeals from the union trial board's decision would be processed according to the criteria set forth in the UAW Constitution. Petitioner, however, refused delivery of this registered letter. Counsel for Petitioner has acknowledged this error in a letter to Respondent's counsel.

Petitioner also claims that an official of the Local at one point refused to provide him with a copy of the UAW Constitution. Neither the District Court nor the Court of Appeals made any finding with respect to this allegation. In addition, Petitioner was apparently able to obtain a copy of the Constitution somehow: his February 1977 letter makes an argument based on "my [Davis'] interpretation of the UAW Constitution." (See Appellee's Brief to Court of Appeals at 12 n.5)

a complaint in Florida state court seeking damages for mental anguish, resulting from his alleged wrongful expulsion from the unions. This suit was removed to federal court, remanded to state court, and removed back to federal court, for good, in August, 1978. Meanwhile, in June, 1978, appellant filed a complaint in federal court alleging wrongful expulsion from the unions contrary to federal law and the unions' rules, and seeking damages for loss of wages and physical and mental suffering. In June 1981, the two cases were consolidated." (App. 2a)

"In June, 1981, and again in July, 1982, appellant moved to file an amended complaint. In October, 1983, although the court had not yet ruled on the motions, appellant filed an amended complaint which added allegations that appellant's expulsion was motivated by plaintiff's criticism of union officers, in violation of his right to free speech under section 101(a)(2) of the LMRDA [Labor-Management Reporting and Disclosure Act], 29 U.S.C. § 411(a)(2). Appellant also added allegations that the UAW's internal appeals procedures were unreasonable and that it would be futile for him to exhaust them, and that exhaustion was not necessary because free speech violations were involved. In April, 1984, appellant's motions to amend were denied and the amended complaint was striken." (App. 2a-3a)

Thus, Petitioner's first suit—in state court—was filed a full nine months after being notified of his expulsion. A complaint in federal court—alleging only that the expulsion was "contrary to federal law and [union] rules" —was filed a year thereafter, twenty-one months after the expulsion. And it was not until *seven years* after his expulsion that Petitioner filed an amended complaint —striken by the District Court—pleading a violation of the LMRDA.

"In July, 1984, the district court granted the appellees' motion for summary judgment on the ground that appel-

lant did not exhaust available internal UAW appeals procedures before seeking judicial intervention.[3] Although the court had striken Davis' amended complaint, its order granting summary judgment addressed the allegations in the amended complaint. The court found that the UAW's intricate appellate grievance procedures were reasonable and adequately safeguarded a union member's interests; and that Davis, as a sixteen-year member who had held several local union offices, could not complain about lack of knowledge of the grievance procedures. It found further that appellant's alleged free speech claims involved "threats and intimidation . . . against other union members as well as alleged disparaging statements against the organization;" that these areas touched on the union's internal affairs; and thus that the conduct was not protected free speech either in the traditional sense or within the scope of 29 U.S.C. § 411(a)(2)." (App. 3a-4a)

The Court of Appeals affirmed the summary judgment on statute of limitations grounds. The court, agreeing with the three other circuits which had already decided the LMRDA limitations issue, reasoned that this Court's recent decision in *DelCostello v. Teamsters*, 462 U.S. 151 (1983) mandated application of the six-month limitations period prescribed in § 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(b), to suits arising under the LMRDA. Because Petitioner had not initiated judicial proceedings of any kind within six months after notification of his expulsion, the Court of Appeals found his action time-barred.

---

[3] "The UAW [had] raised the statute of limitations issue in district court, but the district court declined to rule on it since it had granted summary judgment for failure to exhaust." (App. 4a n.5)

ARGUMENT

The principal question decided by the court below and raised by petitioners here can be simply stated: should actions by union members under the Labor-Management Reporting and Disclosure Act be governed by the statute of limitations prescribed by Congress in § 10(b) of the National Labor Relations Act. There is no disagreement among the Circuits on this question: five Circuits have answered in the affirmative, and none has reached an opposite conclusion. These decisions represent nothing more than a straightforward application of the principles recently established by this Court in *DelCostello v. Teamsters*, 462 U.S. 151 (1983) to a particular factual context. Because the controlling legal principles have been settled by this Court, and because the lower courts have had no difficulty in applying those principles to the LMRDA setting, review by this Court is unwarranted. (See Part I, pp. 5-11 below.)

Nor is there any reason for this Court to review the retroactivity of the decision below. The retroactivity of *DelCostello* has by now been fully litigated in the Circuits, applying the principles enunciated by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). And every appellate court to rule on the narrow issue presented here has applied its holding retroactively. For these reasons, and because the issue of the retroactivity of § 10(b) is a transitional one which will have no significance once the older cases are adjudicated, the retroactivity issue is not worthy of this Court's attention. (See Part II, pp. 10-12 below.)

I. LIMITATIONS PERIOD

1. Just three years ago, in *DelCostello v. Teamsters*, 462 U.S. 151, this Court established the principles which are to guide federal courts in determining when to "borrow" the limitations period prescribed in Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b),

in cases arising under other Federal labor laws that do not provide a limitations period of their own. Since *DelCostello*, five Circuits have decided the issue presented here: whether, in light of the principles established in *DelCostello*, § 10(b) should govern actions arising under the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 401 *et seq.*

All five of the Circuits to decide the LMRDA limitations issue since *DelCostello*, including the Eleventh Circuit in the present case, have held that *DelCostello* mandates application of the § 10(b) period to actions arising under the LMRDA.[4] *Davis v. UAW*, 765 F.2d 1510 (11th Cir. 1985) (App. 13a-19a); *Local 1397 v. Steelworkers*, 748 F.2d 180 (3rd Cir. 1984); *Linder v. Berge*, 739 F.2d 686, 690 (1st Cir. 1984); *Vallone v. Teamsters*, 755 F.2d 520 (7th Cir. 1984); *Adkins v. International Union of Electrical Workers*, 769 F.2d 330, 335 (6th Cir. 1985). See also, *Miller v. Jeep Corp.*, 774 F.2d 111, 114 n.2 (6th Cir. 1985).[5] No Court of Appeals has reached a contrary conclusion.

---

[4] The vast majority of Federal District Courts have reached the same conclusion: *Bigbie v. Teamsters*, —— F. Supp. ——, 114 LRRM 2468 (N.D. Ill. 1983); *Yanick v. Nielsen*, —— F. Supp. ——, 115 LRRM 3295 (N.D. Ca. 1983); *Turco v. Boilermakers*, 592 F. Supp. 1293 (E.D.N.Y. 1984); *McConnell v. Teamsters*, 606 F Supp. 460 (S.D.N.Y. April 10, 1985); *Legutko v. Local 816*, 606 F. Supp. 352, 355-356 (E.D.N.Y. 1985); *but see Gordon v. Winpisinger*, 581 F. Supp. 234 (E.D.N.Y. 1984); *Bernard v. Delivery Drivers*, 587 F. Supp. 524 (D. Colo. 1984).

[5] Petitioner attempts to wish away the significance of three of these cases by claiming that the LMRDA claims involved in those cases were "appended" to duty of fair representation (DFR) claims. (Pet. 9) We know of no reason why joinder of LMRDA claims with DFR allegations would affect the binding nature of the holdings that LMRDA causes of actions are governed by the § 10(b) limitations period. Nor, apparently, do the courts involved: in a subsequent case, the Sixth Circuit characterized *Adkins* as having "held" that the § 10(b) period applies to LMRDA suits. *Miller v. Jeep, supra*, 774 F.2d at 114 n.2. [Continued]

2. In *DelCostello*, the precise issue the Court decided was whether to "borrow" the six-month limitations period governing unfair labor practice cases and apply it to "hybrid" § 301/duty of fair representation claims. In answering that question, the Court established principles which are applicable whenever a court is called upon to decide whether to borrow a federal, rather than a state, limitations period in the context of federal labor law causes of action. These factors include: (i) whether available state periods suit "the realities of labor relations and litigation" (462 U.S. at 167); (ii) whether there is "available a federal statute of limitations actually designed to accommodate a balance of interests . . . similar to that at stake" in the federal suit (*id.* at 169); (iii) whether there is a "family resemblance" or "overlap" between the causes of action statutorily governed by the federal limitations period and those for which a period must be "borrowed" (*id.* at 169-170); and, (iv) whether there is a "similarity of considerations relevant to the choice of limitations period" (*id* at 170-171).

DelCostello applied these factors to the "hybrid" § 301/duty of fair representation suit and concluded that the federal limitations period prescribed in § 10(b) of the NLRA was a "significantly more appropriate vehicle" than a state statute of limitations for enforcement of the federal law. *Id.* at 172.

3. In the wake of *DelCostello*, federal courts have been called upon to apply the principles set forth therein to a wide variety of federal labor relations laws which do not provide limitations periods. Thus, in addition to the LMRDA issue presented here, circuit courts have con-

---

[5] [Continued]

In fact, the appearance of LMRDA claims together with DFR allegations demonstrates the "family resemblance" between LMRDA claims and other causes of action governed by the § 10(b) limitations period. As discussed, *infra* at pp. 7-8, and as the lower courts have found, this "family resemblance" militates for application of the § 10(b) period to LMRDA suits.

cluded that § 10(b) should govern non-"hybrid" DFR claims by members against unions, *Erkins v. Steelworkers*, 723 F.2d 837 (11th Cir. 1984), *cert denied*, —— U.S. ——, 104 S.Ct. 3514 (1984), and "hybrid" suits arising under the Railway Labor Act, *see, e.g., Sisco v. Consolidated Rail Corp.*, 732 F.2d 1188 (3rd Cir. 1984), but that state limitations periods are more appropriate for actions for damages caused by unlawful secondary boycotts under § 303 of the Labor-Management Relations Act, 29 U.S.C. § 187. *Monarch v. Soft Drink Workers*, 762 F.2d 228 (2nd Cir. 1985), *cert. denied*, —— U.S. ——, 54 U.S.L.W. 3392. These decisions reflect nothing more than the ordinary process of sorting out the implications of recent decisions of this Court which is precisely the province of the Circuit Courts. And, in this situation, the Circuits have performed this task without any disagreement.

4. The unanimous conclusion of the appellate courts that § 10(b) applies to LMRDA actions represents the proper application of the *DelCostello* principles to the LMRDA context.

Thus, as the Third Circuit stated in the seminal case on this issue:

> Applying [the *DelCostello*] analysis to this appeal, we find that section 10(b) of the NLRA provides a more appropriate limitations period for suits brought under section 102 of the LMRDA than the state limitations periods urged upon us by appellants. As in *DelCostello*, an analogy between unfair labor practice charges and section 102 suits exists not only in practice, but more importantly in the considerations that underlie the choice of a limitations period in the federal labor law field. Further, we believe that a six-month, rather than a longer limitations period, is fair to all parties given the practicalities of most litigation under the LMRDA.
>
> * * *
>
> [S]uits brought under a section 102 of the LMRDA do bear a "family resemblance" to unfair labor prac-

> tice charges. *Cf. DelCostello*, 103 S.Ct. at 2293 (finding a "family resemblance" between unfair labor practice charges and breach of the duty of fair representation claims). Both section 8(b)(1) of the NLRA and section 102 are addressed to the same basic concern: the protection of individual workers from arbitrary action by unions, which have been appointed the exclusive representatives of such individuals in the workplace. [*Local 1397*, *supra*, 748 F.2d at 183 (footnotes omitted)].[6]

Finally, as the court below explained:

> In *DelCostello*, the Supreme Court found a strong connection between the national interest in labor peace and the necessity of a short time period in which to bring an action based on a labor union's duty of fair representation. We believe we are bound to find a similar connection between labor peace and an action based on a union's alleged mistreatment of its members by the denial of statutorily protected rights." [App. 8a-9a]

See also, *Local 1397*, 748 F.2d at 183-184; *Adkins*, 769 F.2d at 335; *Vallone*, 755 F.2d at 521-522.

5. Petitioner attempts to manufacture a "split" in the circuits by referring to a case which applied the *DelCostello* principles to a *different issue*—actions under § 303 of the Labor Management Relations Act—and concluded that state limitations periods provided the most apt analogy for such actions. *Monarch v. Soft Drink Workers*, 762 F.2d 228 (2nd Cir. 1985), *cert. denied*, —— U.S. ——, 54 U.S.L.W. 3392. In order to characterize *Monarch* as in "conflict" with the five circuits which have answered the question presented here, Petitioner is forced into a gross misreading of the reasoning of the court below and the other courts that have addressed the LMRDA issue.

---

[6] This Court has also recognized the kinship between DFR and LMRDA claims. See, e.g., *NLRB v. Allis-Chalmers*, 388 U.S. 175, 181 (1967) (Congress enacted LMRDA "for the same reason" that Supreme Court developed duty of fair representation). *See also*, *Local 1397*, 748 F.2d at 183 n.3.

Petitioner contends that these decisions have applied § 10(b) to actions under LMRDA simply because such cases are "labor cases", and that therefore there is a "conflict in approach" between the decision below and *Monarch*. (Pet. 10) As we have shown, however, the lower courts have applied the legal principles developed in *DelCostello*—principles significantly more sophisticated than the simple identification of "labor cases"—to the specific question of limitations periods under LMRDA and have unanimously concluded that § 10(b) is the most appropriate limitations period. The fact that another circuit has examined an *entirely different* cause of action under the *DelCostello* principles and concluded that state law provides the most appropriate limitations period does not create a "conflict in approach," let alone a "split in the Circuits" worthy of this Court's review. In fact, the co-existence of *Monarch* and *Davis* demonstrates that circuit courts are properly refusing to read *DelCostello* as mandating a wooden application of § 10(b) to all "labor cases."

II. RETROACTIVITY

Petitioner also argues that the Circuit Court's "retroactive" application of its decision to bind the parties in the instant case requires review by this Court. Review on this issue is unwarranted for several reasons.

First, as with the limitations issue, discussed *supra*, the Circuit Courts facing the retroactivity issue have been called upon *not* to decide a novel question of law but merely to apply to a specific situation principles clearly established by this Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Not surprisingly, this Court has denied *certiorari ten times* on the issue of retroactive application of *DelCostello* to hybrid § 301/DFR suits.[7]

---

[7] *Teamsters v. Edwards*, —— U.S. ——, 52 U.S.L.W. 3682 (March 19, 1984); *Local 1020 v. McNoughton*, —— U.S. ——, 53 U.S.L.W. 3286-87 (Oct. 15, 1984); *Rogers v. Lockheed-Georgia*, —— U.S. ——, 53 U.S.L.W. 3287 (Oct. 15, 1984); *Murray v. Branch Motor Express*, —— U.S. ——, 53 U.S.L.W. 3287 (Oct. 15, 1984); *Erkins v. Steelworkers*, —— U.S. ——, 52 U.S.L.W. 3888 (June 11,

Second, the "retroactivity" of *DelCostello* has been the subject of much follow-up litigation in the Circuits and the overwhelming weight of this authority establishes that *DelCostello* is to be applied retroactively to "hybrid" suits.[8] The five circuits addressing the LMRDA limitations issue have not only been unanimous in applying § 10(b), but have also unanimously followed the weight of this authority and applied their LMRDA decisions retroactively.

Third, the issue of retroactive application of § 10(b) is transitional—arising only in suits commenced prior to establishment of the rule that § 10(b) is applicable. Whatever importance this issue once enjoyed is therefore diminishing as *DelCostello* assumes its position as the recognized authority.

Finally, the unanimous conclusion of the courts of appeals to apply § 10(b) retroactively to LMRDA suits represents a proper understanding and application of *Chevron*. As the Third Circuit explained in *Local 1397*,

---

1984); *Welyczko v. U.S. Air*, —— U.S. ——, 53 U.S.L.W. 3395 (Nov. 26, 1984); *Bedat v. McLean Trucking*, —— U.S. ——, 53 U.S.L.W. 3804 (May 13, 1985); *Glover v. United Grocers*, —— U.S. ——, 53 U.S.L.W. 3822 (May 20, 1985); *Rodman v. Hensley*, —— U.S. ——, 53 U.S.L.W. 3730 (April 16, 1985); *Freight Checkers v. Alderson*, —— U.S. ——, 53 U.S.L.W. 3893 (June 24, 1985).

[8] *Graves v. Smith's Transfer Corp.*, 736 F.2d 819 (1st Cir. 1984); *Welyczko v. U.S. Air*, 733 F.2d 239 (2nd Cir. 1984), *cert. denied*, —— U.S. ——; *Perez v. Dana Corp.*, 718 F.2d 581 (3rd Cir. 1983); *Murray v. Branch Motor Express*, 723 F.2d 1146 (4th Cir. 1983), *cert. denied*, —— U.S. ——, 53 U.S.L.W. 3287 (Oct. 15, 1984); *Gray v. Meat Cutters*, 736 F.2d 1055 (5th Cir. 1984); *Smith v. General Motors*, 747 F.2d 372 (6th Cir. 1984) (en banc); *Landahl v. PPG Industries*, 746 F.2d 1312 (7th Cir. 1984); *Lincoln v. District 9*, 723 F.2d 627 (8th Cir. 1983); *Barnett v. United Air Lines*, 738 F.2d 358, 364 (10th Cir. 1984) (applied retroactively without discussion); *Rogers v. Lockheed Georgia*, 720 F.2d 1247 (11th Cir. 1883), *cert. denied*, —— U.S. ——, 53 U.S.L.W. 3287 (Oct. 15, 1984); but see, *Edwards v. Teamsters*, 719 F.2d 1036 (9th Cir. 1983), *cert. denied*, —— U.S. ——, 52 U.S.L.W. 3682 (March 19, 1984).

this is true for several reasons: "the principle of adopting federal, rather than state, limitations periods in the area of federal labor law ha[d] been openly discussed in the courts, and even adopted by some courts prior to *DelCostello*," *Local 1397*, 748 F.2d at 184; *see also*, *Landahl v. PPG Industries*, 746 F.2d 1312, 1314-1315 (7th Cir. 1984); prospective-only application of the limitations rule articulated below would "retard" the operation of that rule by significantly postponing implementation of a uniform federal limitations period, *Local 1397*, 748 F.2d at 184; and retroactive application would not work a significant inequity on the parties, as Congress has explicitly concluded that a six-month period provides the proper balance of equities in a closely-related setting. Indeed, Petitioner here, who inexplicably waited seven years before pleading a violation of the LMRDA, has given every "indication that he is sleeping on his rights, [and] it is [therefore] not inequitable to apply the statute of limitations retroactively to bar his claim." *Perez v. Dana Corp.*, 718 F.2d 581 (3rd Cir. 1983).

Thus, given the availability of the clearly enunciated principles in *Chevron* and the well-developed and persuasive Circuit Court authority applying *Chevron* to *DelCostello*, as well as the transitional nature of the retroactivity question and, not insignificantly, the unanimity of the five circuit courts deciding the narrow issue presented here, further review by this Court is unnecessary.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for certiorari.

Respectfully submitted,

JORDAN ROSSEN
(Counsel of Record)
DANIEL W. SHERRICK
8000 E. Jefferson Avenue
Detroit, Michigan 48214
(313) 926-5216
Attorneys for Respondents

Supreme Court, U.S.
FILED
FEB 14 [illegible]
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-844

In The

Supreme Court of the United States

October Term, 1985

CLYDE L. DAVIS, JR.

Petitioner,

v.

UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UNITED AUTOMOBILE WORKERS LOCAL 970, and CLAUDE PEREIRA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY BRIEF

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison
Arthur L. Fox II
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704
Attorneys for Petitioner

February, 1986

CASILLAS PRESS INC. - 1717 K STREET NW WASHINGTON DC - 223-1220

4 1-1

In The

Supreme Court of the United States

October Term, 1985

CLYDE L. DAVIS, JR.

Petitioner,

v.

UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UNITED AUTOMOBILE WORKERS LOCAL 970, and CLAUDE PEREIRA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITIONER'S REPLY BRIEF

Respondents' principal argument in opposition to the petition for a writ of certiorari is that there is no substantial division among the lower courts about the proper statute of limitations for suits under Title I of the Landrum-Griffin Act. However, on February 10, 1986, the Court of Appeals for the First Circuit issued a decision which rejects both the analysis and the result of the court of appeals in this case and of the Third Circuit in *Steelworkers Local 1397 v. Steelworkers,* 748 F.2d 180 (3d Cir. 1984), and thus creates a direct conflict among the circuits which requires resolution by this Court. *Doty v. Sewall,* No. 85-1428 (1st Cir., February 10, 1986). In addition, five more district court decisions have rejected the reasoning of the Eleventh Circuit here and reached results similar to the First Circuit in *Doty. Testa v. Gallagher,* 621 F.Supp. 476 (S.D.N.Y. 1985); *Rodonich v. Laborers,* 120 LRRM 3304 (S.D.N.Y. 1985); *Agola v. Hagner,* 120 LRRM 3279 (E.D.N.Y. 1985);

Gordon v. Winpisinger, 120 LRRM 3303 (E.D.N.Y. 1985); *Rector v. Elevator Constructors Local 10,* ____ F. Supp. ____, No. Y-85-1142 (D. Md. 1985), *pet. for leave to file interlocutory appeal denied,* No. 85-8108 (4th Cir. 1986). (Copies of the *Rector* and *Doty* opinions have been lodged with the Clerk). And another court has expressed doubt that the six-month period would apply to such cases, but did not decide the question because in any event it would not apply the ruling retroactively. *Stolz v. Carpenters Local 971,* 620 F. Supp. 396 (D. Nev. 1985).[1]

Indeed, the First Circuit is one of the courts on which respondents relied in asserting that the courts of appeals were unanimous in favor of applying section 10(b) to the Landrum-Griffin Act, Br. at 6. However, in *Doty,* Judge Coffin wrote for a unanimous court that, unlike hybrid fair representation suits which basically seek to vindicate economic rights, Title I suits are akin to civil rights cases where "the interests served by a rather short statute of limitations in *DelCostello,* stable labor-management relationships and finality in privately grieved and arbitrated settlements, are virtually, if not entirely, absent," Opin. at 15. He further noted that "the sorts of interests protected by the LMRDA make it inappropriate to limit suits under that act without a compelling reason." *Id.* at 19. Indeed, although the *Doty* court did not pass on the precise facts of this case, it criticized the decision of the court below for its "precipitate jump . . . to the conclusion that the 'national interest in labor peace' identified in *DelCostello* requires a foreshortened period within which to sue a union for mistreatment of its members." *Id.* at 23. Finally, unlike the court below, the First Circuit found it appropriate to borrow the general tort limitation period, which it deemed appropriate in light of the fact that federal civil rights claims also use that statute of limitations.

---

[1] *See also Jones v. Consolidated Freightways Corp.,* 120 LRRM 3286 (10th Cir. 1985) (joining other circuits in refusing to apply *DelCostello* retroactively).

Respondents also attempt to minimize the conflict between the decision below and the Second Circuit's decision in *Monarch v. Soft Drink Workers,* 762 F.2d 228 (2d Cir. 1985), on the ground that different causes of action were involved.[2] But petitioner's point was that, like the First Circuit in *Doty,* the *Monarch* court took an entirely different approach to the borrowing of the six-month period of section 10(b) than do those courts which have applied it to union democracy cases. Indeed, four of the decisions cited above which declined to apply the six-month period to cases under Title I of the Landrum-Griffin Act (*Rodonich, Testa, Agola* and *Gordon*) did so because the courts believed that *Monarch* compelled that result.

Because there is now a clear conflict among the circuits on an important question which will continue to arise until it is resolved by this Court, certiorari should be granted.

Respectfully submitted,

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison
Arthur L. Fox II
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioner

February, 1986

---

[2]The Sixth Circuit recently adopted the *Monarch* approach. *Carruthers Ready-Mix v. Cement Masons Local 520,* 121 LRRM 2298 (1985).

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUPREME COURT OF THE UNITED STATES

CLYDE L. DAVIS, JR. *v.* UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85–844. Decided March 3, 1986

The petition for writ of certiorari is denied.

JUSTICE WHITE, dissenting.

The question presented is what statute of limitations to borrow in this suit against a union for an alleged violation of a former member's rights under § 101 of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U. S. C. § 411. The United States Court of Appeals for the Eleventh Circuit held that in light of *DelCostello* v. *International Brotherhood of Teamsters*, 462 U. S. 151 (1983), the appropriate source from which to borrow a limitations period is not state law but § 10(b) of the National Labor Relations Act, 29 U. S. C. § 160(b). 765 F. 2d 1510 (1985). Although not without support in other circuits, see, *e. g.*, *Local Union 1397* v. *United Steelworkers of America, AFL–CIO*, 748 F. 2d 180 (CA3 1984), the Eleventh Circuit's decision in this case conflicts with *Doty* v. *Sewall*, —— F. 2d —— (CA1 1986). *Doty* explicitly rejects the analysis of this case and *Local Union 1397*, *supra*, and holds that the usual practice of borrowing statutes of limitations from state law should be followed in a suit like this one. I would grant certiorari to resolve this conflict.